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IN THE

Supreme Court of the United States

October Term, 1949

No. 269

HARRY F. RUSSELL, JUDGE OF THE CIRCUIT COURT OF THE CITY OF ST. LOUIS, MISSOURI.
Petitioner

v.

THE STATE OF MISSOURI, AT THE RELATION OF ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, A CORPORATION,
Respondent.

PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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In The

Supreme Court of the United States

October Term, 1949

No. 269

HARRY F. RUSSELL, Judge of the Circuit Court of the City of St. Louis, Missouri.
Petitioner

v.

THE STATE OF MISSOURI, at the Relation of St. Louis-San Francisco Railway Company, a Corporation,
Respondent.

PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Respondent's brief opposes granting of the writ of certiorari on two grounds: (1) that the case presents a jurisdictional labor dispute, hence is not determinable by the courts; and (2) that "forebodings as to possible adverse decision if matter is submitted to the National Railroad Adjustment Board are not proper grounds for judicial review."

ARGUMENT

I.

The applicable decisions of this Court construing the Railway Labor Act as amended June 21, 1934, C. 691, 48 Stat. 1185, clearly establish jurisdiction of the Courts to determine the issues presented in this case.

In spite of the restrictions placed by the Railway Labor Act of June 21, 1934 on judicial relief, this Court has nevertheless been able to take jurisdiction to protect minority workers whose individual rights are opposed by the dominant railway labor union in the area of controversy.

Elgin, Joliet & Eastern R. Co. v. *Burley*, 325 U. S. 711;
Steele v. *L & N R. Co.*, 323 U. S. 192;
Tunstall v. *L & N R. Co.*, 323 U. S. 210;
Cf. Moore v. *Illinois Central R. Co.*, 312 U. S. 630.

Even the cases which restrict judicial relief provide that where constitutional considerations are involved, or there is a threatened sacrifice or obliteration of a right created by Congress to protect the interests of individuals or the public, a court of equity can intervene.

Switchmen's Union of N.A. v. *National Mediation Board*, 320 U.S. 297, 300-301
Order of Railway Conductors v. *Pitney*, 326 U.S. 561, 566

In the instant case the constitutional guaranty of due process is involved in forcing the Negro head-end passenger brakemen (called "trainporters" because of color) to submit their complaint to the First Division of the National Railroad Adjustment Board [1] for a definitive interpretation of their agreement and employment relation with the carrier in their claim to continue performing the head-end braking functions on respondent carrier's passenger trains.

Petitioner attaches as Exhibit A hereto, and asks the Court to take judicial knowledge thereof as a public document filed with a Federal agency under the Railway Labor

[1] Respondent does not challenge the Return to the Preliminary Writ in the Missouri Supreme Court that the Negro trainporters are "trainmen, so designated and treated by Relator" (respondent carrier) R.33. The Railway Labor Act expressly places trainmen under the jurisdiction of the First Division of the National Railroad Adjustment Board. Section 3 First (h) 45 U.S.C. sec. 153 First (h); petitioner's main brief, p.47.

Act, [2] of the rules adopted by the Railway Labor Executives Association in 1934 governing the selection and assignment of the labor members of the National Railroad Adjustment Board. These Rules show that the only labor organizations which can place members on the First Division are the five operating unions—all of which exclude Negroes from membership and four of which (Brotherhood of Locomotive Engineers, Brotherhood of Locomotive Firemen & Enginemen, Brotherhood of Railroad Trainmen and Order of Railway Conductors) have a record of persistent hostility to the use of Negroes as brakemen or firemen on *this very carrier* property (R. 45-47; and see further petitioner's main brief).

In addition, petitioner attaches Exhibit "B" which brings the case directly within the text of *Steele* v. *L & N R. Co.*, 323 U.S. 192 at p. 206. Exhibit "B" which petitioner asks the Court to take judicial notice of shows that May 19, 1949 the five operating unions and the three regional carriers' committees for the National Railroad Adjustment Board made an agreement to establish two supplemental boards of four men each to relieve the congestion of cases before the First Division, to take over any cases which might be assigned them by the First Division under the Railway Labor Act section 3 First (w), 45 U.S.C. Section 153 First (w) (quoted in petitioner's main brief, p. 51). Labor

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[2] Exhibits A and B hereto are taken from the files of the National Mediation Board and certified correct under its seal and the signature of its Secretary. Section 5 Third (f) of the Railway Labor Act, 45 U.S.C. sec. 155 Third (f), provides:

> "When any new contract is executed or change is made in an existing contract with any class or craft of its employees covering rates of pay, rules, or working conditions, or in those rates of pay, rules and working conditions of employees not covered by contract, the carrier shall file the same with the Mediation Board within thirty days after such new contract or change in existing contract has been executed or rates of pay, rules, and working conditions have been made effective."

In practice this has been construed by the industry as requiring the filing with the National Mediation Board of all rules and regulations adopted under the Railway Labor Act governing the working conditions of employees, as well as formal agreements.

representation on these two supplemental boards is

> (1) on the first supplemental board: the Brotherhood of Locomotive Engineers and the Brotherhood of Locomotive Firemen & Enginemen
>
> (2) on the second supplemental board: the Order of Railway Conductors and the Brotherhood of Railroad Trainmen.

Since the dispute involves braking functions, the Negro trainporters would be sent to the second supplemental board. This brings the Steele case into play because

> ". . . .the carrier and the representative against whom the Negro firemen have complained have power to supersede entirely the Adjustment Board's procedure and to create a tribunal of their own selection to interpret and apply the agreements now complained of to which they are the only parties. We cannot say that a hearing, if available, before either of these tribunals would constitute an adequate administrative remedy. *Cf. Tumey* v. *Ohio*, 273 U.S. 510, 71 L. ed 749, 47 S. Ct. 437, 50 A.L.R. 1243" (loc. cited at p. 206).

It is respectfully submitted that the due process clause of the Fifth Amendment to the Federal Constitution, and the Federal Civil Rights Act (8 U.S.C. sec. 41) would be sacrificed and obliterated if the Negro head-end passenger brakemen (trainporters) had to submit their right to continue in their common calling and to continue to perform their present braking duties on the head-end of respondent's passenger trains to either the First Division or the supplemental boards for interpretation of their working agreement with the carrier. If such an imposition would not obliterate the constitutional and civil rights mentioned, then Negro operating employees must resign themselves to be eliminated from railroad service under abuse of government authority.

There is another item in which the judgment of the

Missouri Supreme Court in this case is patently wrong. In *Howard* v. *Thompson*, 72 F. Supp. 695 the United States District Court for the Eastern Judicial District of Missouri had found that a notice which this carrier had served on its Negro trainporters March 9, 1946 abolishing all trainporter positions effective April 1, 1946 violated the Railway Labor Act as being a change in the working conditions of the trainporters as a class without giving them a 30-day notice provided in Section 6 of the Railway Labor Act (45 U.S.C. sec. 156), and issued a permanent injunction against the carrier abolishing such positions under such notice. The Missouri Supreme Court found in this case that the five-day notices served on the Negro trainporters here were part of the same scheme and violated the Railway Labor Act. (R. 79) Nevertheless in spite of the finding of violation of the Railway Labor Act the Missouri Supreme Court restricted petitioner to enjoining the operation of such notice only "until the Boards established by the Railway Labor Act have decided the jurisdictional dispute, and the representation and classification matters, or for a reasonable time for their jurisdiction to be invoked." (R. 79) At least, petitioner was entitled to give permanent relief against this patent violation of the statutory right created in Section 6 by Congress; and the judgment of the Missouri Supreme Court should be reversed.

II.

The petition is not premature.

It is respectfully submitted that the objection that the petition is premature is frivolous. The Negro trainporters are not required to await the decision of the First Division before complaining. If they submitted to the jurisdiction they would waive their objections as to prejudice.

The basic complaint of the Negro trainporters is that as far as they are concerned the First Division and the supplemental boards are the administrative equivalent of

"coram non judice," and they cannot be forced to submit their claims to such tribunals.

Imminent wrong is threatened. Even the Missouri Supreme Court recognizes this by approving the temporary injunction against the displacement of the Negroes from their jobs (R. 79). The Missouri Supreme Court has charted a mandatory course of procedure which amounts to a present and certain confiscation of their rights. To argue that the complaint is premature is to have a double standard of justice and not to accord equal justice under law.

CONCLUSION

It is apparent from the record that the operating unions are trying to establish a racially closed shop among operating employees on this respondent carriers' property against the clear command of the Railway Labor Act establishing an open shop policy. The Negro trainporters have an equal right under the Federal Civil Rights Act to follow their calling and continue in their employment as operating employees. The Courts must take jurisdiction to protect them against the obliteration and sacrifice of their constitutional and statutory rights.

Respectfully submitted,

VICTOR PACKMAN,
HENRY D. ESPY,
CHARLES H. HOUSTON,
JOSEPH C. WADDY,
Attorneys for Petitioner

APPENDIX

EXHIBIT A

"Rules to Govern the Selection of Labor Members of the National Railroad Adjustment Board provided for in the Amended Railway Labor Act, Effective June 21, 1934."

NATIONAL MEDIATION BOARD

WASHINGTON

CERTIFICATION

To Whom It May Concern:

I, Thomas E. Bickers, Secretary of the National Mediation Board, do hereby certify that the attached copy of document described as follows:

"Rules to Govern the Selection of Labor Members of the National Railroad Adjustment Board provided for in the Amended Railway Labor Act, Effective June 21, 1934."

is a true and complete copy of the original rules which are on file in the office of the National Mediation Board, which is a public office of the United States not pertaining to a court.

In witness whereof, I have hereunto affixed the official seal of the National Mediation Board and subscribed my name at Washington, D. C., this 23rd day of September, 1949.

(Seal)

/s/ T. E. BICKERS
THOMAS E. BICKERS, *Secretary*

COPY

Rules to Govern the Selection of Labor Members of the National Railroad Adjustment Board Provided for in the Amended Railway Labor Act, Effective June 21, 1934.

Pursuant to instructions your committee submits the following as its report and recommendations in respect to the rules under which the labor members of the National Railroad Adjustment Board, created by the Railway Labor Act as amended June 21, 1934, shall be selected:

Our investigation discloses that the following national labor organizations were organized in accordance with the provisions of Section 2 of the Railway Labor Act as amended and are the qualified organizations to participate in the making of rules and the selection of the labor members of the adjustment board. We have grouped these organizations in conformity with the several divisions of the adjustment board as defined in the Act as amended:

Division 1—Brotherhood of Locomotive Engineers
Brotherhood of Locomotive Firemen and Enginemen
Order of Railway Conductors
Brotherhood of Railroad Trainmen
Switchmen's Union of North America

Division 2—International Association of Machinists
International Brotherhood of Boilermakers Iron Ship Builders and Helpers of America
International Brotherhood of Blacksmiths, Drop Forgers and Helpers
Sheet Metal Workers' International Assn.
International Brotherhood of Electrical Workers
Brotherhood Railway Carmen of America
International Brotherhood of Firemen & Oilers

Division 3—The Order of Railroad Telegraphers
American Train Dispatchers' Association
Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express & Station Employees
Brotherhood of Railroad Signalmen of America
Order of Sleeping Car Conductors
International Brotherhood of Teamsters, Chauffeurs & Stablemen of America

Division 4—National Organization Masters, Mates and Pilots of America
National Marine Engineers' Beneficial Assn.
International Longshoremen's Association
International Seamen's Union of America

(1) Nominees for membership on each division of the adjustment board shall be restricted to the organizations representing employees in said division and no organization shall be permitted to nominate more than one candidate for membership thereon. Such nominations shall be made through the chief executive of each of said organizations or such other medium as each organization shall designate; provided, however, that when the number of qualified organizations representing the employees embraced in any division of the adjustment board are equal to the number of labor members on that division, then each such organization acting through its chief executive or other medium designated by the organization shall appoint one member to that division of the board.

(2) Except as provided in the preceding paragraph, each nominee for membership on the National Adjustment Board shall be qualified to serve on said board when confirmed by a majority of all the qualified organizations, each acting through its chief executive or other medium designated

by the organization; each qualified organization being entitled to one vote.

(3) In the case of a permanent or temporary vacancy on the adjustment board, such vacancy shall be filled by selection in the same manner as in the original selection.

(4) These rules may be revised at any time by a majority of the qualified organizations.

The above rules were adopted at Chicago, Ill., June 29, 1934.

EXHIBIT B

Memorandum dated May 9, 1949, executed by the Chief Executive Officers of the Five Operating Organizations and the Three Regional Carriers' Committees for the National Railroad Adjustment Board setting up two supplemental boards of four men each with authority to handle cases on the docket of the First Division of the National Railroad Adjustment Board and such additional cases as may be assigned to them by such Division.

NATIONAL MEDIATION BOARD

WASHINGTON

CERTIFICATION

To Whom It May Concern:

I, Thomas E. Bickers, Secretary of the National Mediation Board, do hereby certify that the attached copies of Memoranda dated May 19, 1949, executed by the Chief Executive Officers of the Five Operating Organizations and the Three Regional Carriers' Committees for the National Railroad Adjustment Board (1) setting up two supplemental boards of four men each with authority to handle cases on the docket of the First Division of the National Railroad Adjustment Board and such additional cases as may be assigned to them by such Division, and (2)* recommending certain changes in rules of the First Division with respect to ex parte submissions, are true and complete copies of the original memoranda which are on file in the Office of the National Mediation Board, which is a public office of the United States not pertaining to a court.

In witness whereof, I have hereunto affixed the official seal of the National

* No. 2 omitted here as irrelevant.

Mediation Board and subscribed my name at Washington, D. C., this 23rd day of September, 1949.

(Seal)

/s/ T. E. Bickers
Thomas E. Bickers, *Secretary*

COPY 5/19/49

MEMORANDUM

The chief executive officers of the five operating organizations and the three regional carriers' committees for the National Railroad Adjustment Board are agreed on the following procedure:

Two supplemental boards of four men each will be set up under the provisions of Section 3 First (w) of the Railway Labor Act with authority to handle cases now on the docket of the First Division of the National Railroad Adjustment Board, assigned to them by such First Division, and such additional cases as may be assigned to them by such Division, as hereafter provided. One board shall consist of one representative each appointed by the Brotherhood of Locomotive Engineers and Brotherhood of Locomotive Firemen and Enginemen, and two representatives appointed by the Carriers. The other board shall consist of one representative each appointed by the Order of Railway Conductors and Brotherhood of Railroad Trainmen, and two representatives appointed by the Carriers.

It is understood that the members on such boards may be changed from time to time. Representatives from any railroad involved in cases assigned to such boards may be appointed as board members to handle cases coming from that railroad and members may be changed from time to time as the cases involve different railroads.

Initially, in assigning cases to such supplemental boards, the First Division shall assign cases which have not been certified for appointment of a referee involving any railroad system where ten or more cases are on the docket as

as of the date of the appointment of such supplemental boards, involving employes represented by either or both of the Organizations on each board respectively. Example: If the "A" railroad has seven cases involving the B of L E and four cases involving the B of L F & E they will be assigned to the supplemental board on which representatives of those two organizations serve. The same example is applicable to the O R C and B of R T.

Thereafter, from time to time the First Division shall assign to such supplemental boards cases involving a railroad system whenever ten or more cases are docketed, in the same manner as described in the preceding paragraph.

Cases where the interest of an organization not represented on such supplemental board is asserted by either party or by a member of the First Division, shall be retained by the First Division and shall not be assigned to such supplemental board.

It is agreed that such supplemental boards shall be established for a period of one year, and thereafter subject to termination upon request of the chief executive officers of the five operating organizations or the three regional carrier committees upon ninety days' notice.

/s/ A. JOHNSTON,
Grand Chief Engineer,
Brotherhood of Locomotive Engineers

/s/ D. B. ROBERTSON,
International President,
Brotherhood of Locomotive Firemen and Enginemen

/s/ H. W. FRASER (ROH),
President.
Order of Railway Conductors

/s/ D. M. MACKENZIE,
Assistant President,
Brotherhood of Railroad Trainmen

/s/ A. J. GLOVER,
President,
Switchmen's Union of North America

/s/ H. A. ENOCHS,
Chairman,
Eastern Committee for the National Railroad Adjustment Board

/s/ D. P. LOOMIS,
Chairman,
Western Committee for the National Railroad Adjustment Board

/s/ C. A. MACKAY,
Chairman,
Southeastern Committee for the National Adjustment Board

Witness:

/s/ FRANCIS A. O'NEILL, JR.,
Chairman, National Mediation Board